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No. 76-120

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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UNITED STATES OF AMERICA, PETITIONER

*v.*

MARTIN LINEN SUPPLY COMPANY and
TEXAS SANITARY TOWEL SUPPLY CORPORATION

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-9a) is reported at 534 F.2d 585. A prior opinion of the court of appeals (App. C, *infra*, pp. 11a-28a) is reported at 485 F.2d 1143. A prior opinion of the district court (App. D, *infra*, pp. 29a-39a) is not officially reported.

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 10a) was entered on June 21, 1976. On July 15, 1976, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including August 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Double Jeopardy Clause precludes an appeal by the United States from an order, otherwise appealable under 18 U.S.C. 3731, because the order was entered in response to a motion filed several days after a mistrial had been declared because of the inability of the jury to reach a verdict at an earlier trial of the same charge.

## CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.



3. Federal Rule of Criminal Procedure 29(c) provides:

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

## STATEMENT

On December 9, 1971, the United States filed civil and criminal contempt petitions in the Western District of Texas. The petitions alleged that respondents, two commonly owned linen supply companies, and their president, William B. Troy, violated a consent decree entered in 1969 as the final judgment in an antitrust suit. See App. G, *infra*, pp. 44a-52a.

The district court dismissed the petitions to the extent they alleged violations of Section V(A)(1) of the consent decree. Section V(A)(1) prohibits respondents from "directly or indirectly: (A) Threat-

ening, coercing, inducing or attempting to induce: (1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer" (App. G, *infra*, pp. 46a-47a). The contempt petitions alleged that respondents threatened their competitors with economic reprisals. The district court concluded, however, that Section V(A)(1) does not prohibit respondents from threatening competitors with economic reprisals, or offering to competitors economic inducements, in order to induce the competitors to quit soliciting linen supply business from respondents' existing customers (App. D, *infra*, pp. 34a-39a).

The United States appealed, and the court of appeals reversed. It wrote that the activities alleged in the petition are violations of the decree "if their announced purpose is to cause [respondents'] competitors to refrain from competing * * *. * * * [T]he use of threats directed at competitors to restrain competition, or to obtain reciprocal noncompetitive agreements, as the Government alleges, goes to the heart of the antitrust problem" (App. C, *infra*, p. 27a). The court remanded for a trial to determine whether the allegations are true. This Court denied certiorari. 415 U.S. 915.

After the prosecution declined to consent to a bench trial, the district court severed the criminal and civil proceedings. The criminal trial commenced on February 18, 1975.[1]

[1] The civil contempt proceedings have not yet been tried.



At the trial, several witnesses described a series of threats of economic retaliation by different executives of respondent Martin Linen, directed at different competitors. The witnesses also testified that two executives of respondent Martin Linen threatened Flake Uniform Linen Service with retaliation if it persisted in soliciting customers of respondent Texas Sanitary. The government also presented testimony and documents demonstrating that respondent Martin Linen conducted a retaliatory sales campaign against Flake Uniform. Respondents did not offer any evidence to contradict the evidence concerning threats.

On February 21, 1975, the jury returned a verdict of not guilty with respect to Mr. Troy. The jury reported that it was deadlocked with respect to respondents.[2] The court excused the jurors and declared a mistrial as to respondents (App. A, *infra*, pp. 2a-3a).

After the jurors had departed, the district judge advised counsel that he would be inclined "to enter a judgment of acquittal as to [respondents] if an appropriate motion was made" (J.A. 673a). He also said (J.A. 676a-677a): "Sometimes the Defendant enters into a consent decree and later rues the day that he did it and wishes that he had had an opportunity to retry that question again. Once he is under it, then it is up to the Court to let him out of it."

[2] The jurors reported that the vote stood eleven to one in favor of conviction. J.A. 669a-670a. ("J.A." refers to the joint appendix in the court of appeals).

On February 27, respondents accepted the court's invitation and filed motions for acquittal. On April 22, more than two months after the mistrial had been declared, the district court entered judgments of acquittal. Although the court did not render findings of fact or conclusions of law, the judgments recited that "the Court finds that the grounds set forth in [the motion for acquittal] are good and valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that further this defendant should be found 'not guilty'" (Apps. E and F, *infra*, pp. 41a, 43a).

The United States appealed pursuant to the Criminal Appeals Act, 18 U.S.C. 3731. The court of appeals concluded that the Double Jeopardy Clause barred the government's appeal. The court observed that the proceedings in the district court ended in an "acquittal" entered under Fed. R. Crim. P. 29(c) (App. A, *infra*, pp. 4a-5a). It quoted *United States* v. *Jenkins*, 420 U.S. 358, 370, as establishing a "general rule" (App. A, *infra*, p. 7a) that "it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." Because a reversal of the district court's "acquittal" would enable the government to try respondents a second time, the court concluded that the "general rule" announced in *Jenkins* "leads inescapable to the



conclusion that no appeal lies from the directed verdict ordered by the court below" (App. A, *infra*, pp. 7a-8a).[3]

The government had relied in the court of appeals upon *United States* v. *Sanford*, 421 U.S. 996. The court of appeals in *Sanford* had dismissed a government appeal from a post-mistrial order dismissing an indictment. This Court remanded the case for reconsideration in light of *Serfass* v. *United States*, 420 U.S. 377, an action which the court of appeals took to mean that the appeal should be permitted in that case (App. A, *infra*, pp. 8a-9a).[4] The court distinguished *Sanford*, however, observing that the district court in *Sanford* had dismissed the indictment long after the time for filing a post-trial motion under Fed. R. Crim. P. 29(c) had elapsed. In the court's view, this made the order in *Sanford* an appealable "pretrial dismissal" (App. A, *infra*, p. 9a), whereas the order in the instant case was nonappealable because it was an "acquittal" entered pursuant to a motion made within seven days after the mistrial.

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[3] The court of appeals did not discuss or distinguish its apparently contrary decision in *United States* v. *Moon*, 491 F.2d 1047 (C.A. 5). It seems fair to say, however, that the court of appeals would have concluded that *Moon* has been undercut by *Jenkins*.

[4] The court of appeals evidently was unaware that almost a month before the date of its decision the appeal in *Sanford* had been dismissed a second time. See *United States* v. *Sanford*, C.A. 9, No. 73-3016, decided May 27, 1976, petition for a writ of certiorari pending, No. 75-1867.

## REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case exacerbates the conflict among the circuits discussed at page 14 of our petition for a writ of certiorari in *United States* v. *Sanford*, No. 75-1867.[5] The court of appeals in this case, like the court of appeals in *Sanford*, has held that the United States cannot appeal from a post-mistrial order dismissing an indictment. But the court here, unlike the court in *Sanford*, has distinguished between two types of post-mistrial orders: it has held that when an indictment is dismissed (or an "acquittal" entered)[6] on motion made within seven days of the mistrial, the Double Jeopardy Clause bars further proceedings, but that when the motion is made eight or more days after the mistrial has been declared, the Double Jeopardy Clause does not bar an appeal or further proceedings.

Under the rule announced by the Fifth Circuit, *both* of the conflicting cases discussed in our *Sanford* petition are wrongly decided. *Sanford* itself was wrongly decided by the Ninth Circuit, according to the Fifth Circuit: the appeal should have been allowed because the dismissal in that case came so

[5] Counsel for respondents in this case are being furnished with a copy of our petition in *Sanford*, and counsel for respondents in *Sanford* is being furnished with a copy of this petition.

[6] As the court of appeals recognized (App. A, *infra*, p. 2a n. 3), the label attached to the order terminating the prosecution is immaterial. *United States* v. *Wilson*, 420 U.S. 332; *Serfass* v. *United States*, 420 U.S. 377, 390-393.



long after the mistrial. *United States* v. *Wilson*, 534 F.2d 76 (C.A. 6), also was wrongly decided under the Fifth Circuit's test, because there the motion to dismiss the indictment was made on the same day the mistrial was declared.

We submit, instead, that the present case and *Sanford* were wrongly decided, and that *Wilson* is correct. There is no reason why appealability should turn upon the length of the interval between the declaration of a mistrial and the filing of a post-mistrial motion to dismiss the indictment.[7] Although the Double Jeopardy Clause gives defendants[8] in criminal cases interests in avoiding multiple trials and in preserving the finality of verdicts in their favor, neither interest is implicated here. Once the mistrial had been declared, the prosecution was entitled to try respondents a second time without viola-

[7] Cf. *United States* v. *Wilson*, *supra*, 420 U.S. at 345 (there is no valid reason to distinguish between post-trial "acquittals" by trial courts and post-trial "acquittals" directed by appellate courts).

[8] Respondents are corporations. This Court has not held that the Double Jeopardy Clause of the Fifth Amendment applies to corporations, and there are strong arguments that it does not apply. See Note, *Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision,"* 28 Stan. L. Rev. 805 (1976). The Court has held that other provisions of the Fifth Amendment, such as the Self-Incrimination Clause, do not apply to corporations. See *Bellis* v. *United States*, 417 U.S. 85; *Wilson* v. *United States*, 221 U.S. 361. We did not argue in the court of appeals, however, that the Double Jeopardy Clause does not apply to corporations, and accordingly we have not presented it as a question for this Court.

tion of the Double Jeopardy Clause; so much has been settled since *United States* v. *Perez*, 9 Wheat. 579. And respondents have no interest in preserving the finality of a "verdict" in their favor, because there is in this case no such verdict. Indeed, there is no verdict at all, the finder of fact—the jury—having divided eleven to one for conviction. The trial judge has no authority to resolve factual issues in a jury trial (*United States* v. *Cravero*, 530 F.2d 666 (C.A. 5)), and so no factual determinations would be subject to reexamination on a second trial. The Double Jeopardy Clause therefore does not bar a second trial of respondents. See Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 Harv. L. Rev. 1822 (1974).

For these reasons, and for the reasons set out at pages 10-17 of our petition in *Sanford*, we believe that the Double Jeopardy Clause does not preclude a second trial of respondents and accordingly does not preclude an appeal by the United States. In our view, *Serfass* and this Court's remand in *Sanford* make this clear beyond cavil. Because the court of appeals in this case has distinguished between two types of post-mistrial orders dismissing an indictment, however, this Court's disposition of *Sanford* (should it grant our petition in that case) would not technically be controlling here. On the other hand, if the Court were to hold that an appeal is permissible in this case, the government's right to appeal in *Sanford* would follow *a fortiori*. The Court may therefore prefer



to consider the issue we present in the context of the instant case and to defer consideration of the petition in *Sanford*.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1976.

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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**No. 75-2322**

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**UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT**

*v.*

**MARTIN LINEN SUPPLY CO., and TEXAS SANITARY TOWEL SUPPLY CORP., DEFENDANTS-APPELLEES**

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**June 21, 1976**

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*Appeal from the United States District Court for the Western District of Texas*

Before GOLDBERG, DYER and SIMPSON, Circuit Judges.

GOLDBERG, Circuit Judge.

The United States appeals to this Court under the provisions of 18 U.S.C. § 3731 [1] from the district

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[1] Section 3731 provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or

court's order granting directed verdicts of acquittal to defendant-appellees Martin Linen Supply Company (Martin Linen) and Texas Sanitary Towel Supply Ccrporation (Texas Sanitary Towel), after a trial by jury on criminal contempt charges that resulted in a hung jury.[2] Section 3731 allows the Government to appeal from any decision dismissing an indictment or information except where the double jeopardy clause of the Constitution prohibits further prosecution.[3] Because we find that the double jeopardy clause would bar further prosecution in this case, we dismiss the appeal for lack of appellate jurisdiction.

Appellee's contempt trial began on February 18, 1975. Three days later, on February 21, 1975, the jury returned a verdict of not guilty as to William B. Troy, an individual defendant whose case is not before us. At the same time, the jury informed the court that it was unable to agree on a verdict as to Martin

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order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

[2] The Government brought the criminal contempt proceeding to enforce the terms of an antitrust consent decree that had been entered on June 2, 1969. Martin Linen and Texas Sanitary Towel had been charged in a civil complaint with violating section 1 of the Sherman Act, 15 U.S.C. § 1.

[3] Because the Supreme Court has focussed on the effect of the ruling sought to be appealed rather than the label placed on the order, we too attach no significance to the fact that the district court here called its order an "acquittal" and not the "dismissal of the indictment." *See, e.g., United States* v. *Wilson,* 1975, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232.



Linen and Texas Sanitary Towel. The court then excused the jurors and declared a mistrial.

After the jurors had departed, the court indicated that it would entertain a motion for directed verdict of acquittal as to Martin Linen and Texas Sanitary Towel, making the following observations:

> I'll be frank with you, gentlemen. I almost instructed a verdict for all Defendants in this case. I almost granted a judgment for the Defendants. I think this is one of the weakest—I'm saying you did a very creditable job with what you had, Mr. Sonnett [Government attorney]. I have seen some contempt cases, but this is without a doubt the weakest I've ever seen.

The judge's next comments revealed his opinion that certain parts of the consent decree were undesirable, in that they placed the companies at a competitive disadvantage. Responding to the court's invitation, the two corporate defendants filed motions for judgments of acquittal on February 27, 1975. The Government filed a memorandum in opposition to the motions. On April 22, 1975, the court granted the motions and entered judgments of acquittal for both defendants.[4] From the order the Government noticed its appeal.

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[4] Both judgments of acquittal recited that the motions were timely made and that "after considering all of the evidence adduced on the trial [of the charges] and all of said motions filed herein having been carefully considered by the Court, the Court finds that the grounds set forth in that Motion are good and valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that fur-

Federal Rule of Criminal Procedure 29(c) permits the court to entertain a timely motion for acquittal after the jury is discharged:

> If the jury returns a verdict of guilty *or is discharged without having returned a verdict*, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. *If no verdict is returned the court may enter judgment of acquittal.* It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury. (Emphasis added.)

The procedure followed in the case before us comported with the requirements of Rule 29(c). The jury was discharged without having returned a verdict; defendants filed their motions for judgments of acquittal within 7 days after the discharge of the jury; and the court entered judgments of acquittal. For the purposes of appellate review, therefore, this is not a case in which the standard governing retrial after a mistrial governs,[5] despite the Government's

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ther this defendant should be found 'not guilty'." In light of this formal finding by the court, we think that the judge's comments regarding his personal opinion of the consent decree are irrelevant.

[5] A new trial is proper after a mistrial in cases where "there is a manifest necessity for the act [of declaring a mis-



efforts to make it so.[6] As the Supreme Court said in

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trial], or the ends of public justice would otherwise be defeated." *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). *See United States* v. *Kessler*, 5 Cir. 1976, 530 F.2d 1246; *United States* v. *Gordy*, 5 Cir. 1976, 526 F.2d 631, 635.

At the trial court level, a two-fold inquiry would be necessary in a case in which the jury was unable to reach a verdict and a timely motion was made under Rule 29(c). First, the district judge would have to weigh the evidence to see if it would have been sufficient to submit to the jury. *See United States* v. *Martinez*, 5 Cir. 1973, 486 F.2d 15, 23. Only if he decided this question in favor of submission would he reach the second inquiry, which would be whether a second trial should be permitted after the mistrial, applying the *Perez* standard.

[6] The Government argues that its right to insist on a jury trial would be abridged if this Court views the proceedings below as if they were the result of a bench trial. This assertion ignores, however, the fact that whether the trial is to a jury or to the court, if the evidence is deemed insufficient to support a verdict or finding of guilty the court must grant a directed verdict of acquittal. *United States* v. *Martinez*, 5 Cir. 1973, 486 F.2d 15, 23.

Furthermore, the Supreme Court clearly rejected any distinction between bench and jury trials in *United States* v. *Jenkins*, 1975, 420 U.S. 358, 366, 95 S.Ct. 1006, 1011, 43 L.Ed.2d 250, 257. The Government's argument that an appeal would have been permitted in *Jenkins* if the district judge had made *all* findings of fact in the Government's favor and had entered judgment for the defendant as a matter of law relies on the wrong analogy. The case it poses is analogous to a jury verdict of guilty followed by a court-directed judgment of acquittal, a situation in which the Government admittedly can appeal. *United States* v. *Wilson*, 1975, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232; *United States* v. *Cravero*, 5 Cir. 1976, 530 F.2d 666. A mistrial followed by a directed verdict of acquittal is, in our opinion, quite a different case.

*United States* v. *Jenkins*, 1975, 420 U.S. 358, 365, 95 S.Ct. 1006, 1011, 43 L.Ed.2d 250, 256 n. 7:

> [W]e think it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the Somerville line of cases [*Illinois* v. *Somerville*, 410 U.S. 458 (1973)], or in the defendant's favor, as they did here.

*Cf. United States* v. *Wilson*, 1975, 420 U.S. 332, 348, 95 S.Ct. 1013, 1024, 43 L.Ed.2d 232, 244 (although retrial after mistrial sometimes permissible if no verdict or judgment entered, verdict of acquittal forecloses retrial and thus bars appellate review). Since the proceedings here terminated in the defendant's favor, we must decide whether this is a case in which the Government may appeal after a directed verdict of acquittal.

The language of section 3731 makes appealability dependent on another question: would the double jeopardy clause of the Constitution bar further proceedings under these circumstances? Congress deliberately chose to make the Government's right to appeal as broad as the Constitution would permit when it passed Title III of the Omnibus Crime Control Act of 1970, Pub.L. 91-644, in which the present version of 18 U.S.C. § 3731 appeared. Recently the Supreme Court discussed the scope of amended section 3731 in three cases: *Serfass* v. *United States*, 1975, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265; *United States* v. *Jenkins*, 1975, 420 U.S. 358, 95 S. Ct. 1006, 43 L.Ed.2d 250; and *United States* v. *Wilson*, 1975, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232. *Serfass* stressed the necessity of a finding that jeopardy has attached as a prerequisite to the applicability of the double jeopardy clause. That requirement is certainly satisfied in the case before us; not only was a jury empaneled and sworn, but it actually heard all the evidence both sides had to offer.



*Jenkins* stated the general rule for appealability as follows:

> But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.

420 U.S. at 370, 95 S.Ct. at 1013, 43 L.Ed.2d at 259 (per Rehnquist, J.). If such additional proceedings would be required, then the double jeopardy clause forbids appeal by the Government. In the case of a mistrial followed by a timely motion for acquittal under Rule 29(c), F.R.Crim.P., which motion is granted, further proceedings devoted to the resolution of factual issues would necessarily follow a successful appeal by the Government. This distinguishes the situation where an acquittal follows a mistrial from the situation presented in *Wilson*, where an acquittal came after a guilty verdict, since in the latter case no further proceedings would follow a successful appeal. The *Jenkins* standard thus leads

inescapably to the conclusion that no appeal lies from the directed verdict ordered by the court below.

The Government's last effort to avoid dismissal of the appeal relies on the Supreme Court's action in relation to *United States* v. *Sanford*, 9 Cir. 1974, 503 F.2d 291. In that case, an indictment had been returned against the defendants and the case was tried in February 1973. That trial resulted in a hung jury and a mistrial. Prior to the retrial, defendants moved to dismiss the indictment. Relying on the evidence adduced at the first trial, the district judge granted the motion. The Ninth Circuit dismissed the Government's appeal, but its decision was vacated and remanded by the Supreme Court for further consideration in light of *Serfass*. *United States* v. *Sanford*, 1975, 421 U.S. 996, 95 S.Ct. 2392, 44 L.Ed. 2d 663.

The Supreme Court's remand of *Sanford* can be reconciled easily with our conclusion that *Jenkins* requires us to dismiss the instant appeal. Prior to *Serfass*, cases such as *United States* v. *Sisson*, 1970, 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed.2d 608, had indicated that appeals from acquittals based on facts external to the indictment might be barred by the double jeopardy clause. The *Wilson* court, however, read *Sisson* as narrowly as possible, and indicated that the result might be different under the amended section 3731. *Serfass* held that the Government could appeal from a pretrial dismissal of an indictment, since at that time jeopardy had not attached. Since the time for a Rule 29(c) motion had apparently



long since elapsed in *Sanford*, the case no longer fell into the category of a mistrial followed by a timely acquittal. Rather, the district court's order was simply a pretrial dismissal, and as such was subject to the *Serfass* decision's rule. In the case before us, in contrast, the acquittal occurred while the original trial court still had jurisdiction over the whole case, in accordance with the Federal Rules of Criminal Procedure. We therefore reject the Government's suggestions that the Supreme Court's action in *Sanford* requires us to find appellate jurisdiction here.

For the reasons stated above, we conclude that this Court has no jurisdiction over the Government's appeal.

APPEAL DISMISSED.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1975

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No. 75-2322

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D. C. Docket No. SA-71-CR-419

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*versus*

MARTIN LINEN SUPPLY CO., and TEXAS SANITARY TOWEL SUPPLY CORP., DEFENDANTS-APPELLEES

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*Appeal from the United States District Court for the Western District of Texas*

Before GOLDBERG, DYER and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby, dismissed.

June 21, 1976



**APPENDIX C**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 72-2796, 72-2800

UNITED STATES OF AMERICA, PETITIONER-APPELLANT

*v.*

MARTIN LINEN SUPPLY COMPANY, ET AL., RESPONDENTS-APPELLEES

Oct. 9, 1973

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This is an appeal from orders of the District Court resulting in the dismissal before trial of civil and criminal contempt petitions brought by the United States charging violations of a final judgment in a civil antitrust action. Contrary to the argument of the respondents, we hold that we have appellate jurisdiction to review these orders which we reverse on the ground that the conduct charged in the petitions could constitute a violation of the antitrust decree.

The antitrust judgment, a consent decree, prohibited each corporate defendant linen supplier [1]

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[1] The corporate defendants include Martin Linen Co. and Texas Sanitary Towel Supply Corp. (Cascade Linen Service). Tex-Mart Corp., which had been named as a defendant in

(collectively referred to herein as "Martin"), from threatening, coercing, inducing or attempting to induce any linen rental supplier to refrain from furnishing linen supplies to any customer. The contempt argument centers on the interpretation and subsequent application to be given this prohibition in relation to Martin's alleged activities.

The appellate jurisdiction problem is difficult. Under the Expediting Act, the Supreme Court has exclusive jurisdiction of appeals from final judgments in every civil action wherein the United States is complainant.[2] Under the Criminal Appeals Act, the Court of Appeals has jurisdiction in a criminal case to review a decision, judgment or order dismissing an indictment or information except where the double jeopardy clause of the Constitution prohibits further prosecution. A criminal contempt prosecution in an antitrust case has been held to be a "criminal case"

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the original complaint and consent decree, was not named as respondent in the petitions. Respondent William B. Troy is included because he is the controlling stockholder and president of both Martin Linen Supply and Cascade Linen Service.

[2] Section 2 of the Expediting Act, as amended (15 U.S.C.A. § 29) provides:

> In every civil action brought in any district court of the United States under [the antitrust laws], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.
>
> Tidewater Oil v. United States, 409 U.S. 151, 93 S.Ct. 408, 34 L.Ed.2d 375 (1972).



within the meaning of 18 U.S.C.A. § 3731.[3] United States v. Goldman, 277 U.S. 229, 48 S.Ct. 486, 72 L.Ed. 862 (1928).

At bar is an appeal from a criminal contempt proceeding over which we have review jurisdiction, and an appeal from a civil contempt proceeding which, standing alone, is beyond our jurisdiction. To further complicate the jurisdictional picture, the District Court entered a separate order "construing" the final antitrust judgment in the civil suit. Although Martin contends that this construction order was a "final judgment" within the Expediting Act, thereby precluding review by our Court, we reason that the construction order is actually a part of the contempt proceedings and should be handled in the same manner as if it were a ruling within the context of a contempt proceeding. Since we have jurisdiction over the criminal contempt appeal, we will additionally review the civil contempt appeal on the rationale of judicial economy found in cross-claim, pendant and ancillary jurisdiction. To hold otherwise would require the same parties to litigate basi-

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[3] 18 U.S.C.A. § 3731 states

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more courts, except that no appeal shall lie where the do e jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . .
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

cally the same issues in two different courts at the same time.

*The Proceedings Below*

In 1969, the United States filed a civil complaint in the District Court alleging that Martin restrained trade in violation of the Sherman Act, 15 U.S.C.A. § 1 et seq., with respect to the business of furnishing linen supplies in the state of Texas. In June, 1969, after negotiation, a consent decree was entered as final judgment in the suit.

In December, 1971, the United States filed the separate civil and criminal contempt petitions under review alleging violations of Section V(A)(1) of the consent decree. That Section provides

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
>
> (A) threatening, coercing, inducing or attempting to induce:
>
> (1) Any linen rental supplier to refrain while in business, from furnishing linen supplies to any customer . . . .

The activities which the Government allege violated the consent decree revolve around Martin's attempts to exact reciprocal agreements from other linen suppliers not to compete for Martin's customers, backed up by warnings of economic reprisals.

After full pre-trial discovery, Martin filed a petition in the original antitrust proceeding for construction of the above Section.[4] The District Court determined that the allegations by the Government centered on Martin's activities aimed at recoupment of its own former customers and retaliations against competitors who solicited its customers. The Court concluded that Section V(A)(1) of the consent decree does not prevent Martin from threatening competitors with economic reprisals to persuade them to refrain from soliciting Martin's customers.[5]



Subsequent to the entry of the construction order and based thereon, the District Court dismissed the criminal and civil contempt petitions against Martin.

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[4] Jurisdiction was retained under Section X of the consent decree:

> Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance herewith and for the punishment of violations hereof.

[5] Accordingly the Court finds:

> 1. The provisions of Section V(A)(1) do not prohibit Martin and Cascade from recouping business lost to competitors, from engaging in price wars and retaliatory sales campaigns to effect such recoupment, and from threatening to engage in those activities.
>
> 2. None of the activities of Defendants charged as violations of Section V(A)(1) in Paragraphs 10, 11, 12 and 13 of the Contempt Petitions and in the Supplementary Papers, violate the injunctions of that Section.

*The Construction Order*

Martin contends that the construction order interpreting a provision of the antitrust consent decree was a final judgment in a civil action and that, since the United States was the complainant, appeal lies only to the Supreme Court under the Expediting Act. The construction order, however, was initiated, viewed in light of, and decided upon the allegations of the contempt petitions. Although the application for construction of the antitrust decree and the construction order bore the caption and docket number of the contempt proceedings, the application was made after the date for the trial of the contempt charges had been set. It was made to the District Judge who was to hear the contempt petitions and not to the District Judge who entered the consent decree in the original antitrust suit. The Memorandum of Points and Authorities accompanying the application referred to the charges in the contempt petitions numerously and stated that the interpretation urged by the Government "in the pending contempt proceedings" would have adverse consequences. Immediate construction was urged in order to "narrow the factual issues of the pending contempt petition trials" and provide a basis for "reappraisal of the entire contempt proceedings and their termination or other disposition without trial."

The District Judge acknowledged in his opinion and order that the application was made "at this time because of the pendency of criminal and civil



contempt proceedings . . . ." After interpreting Section V(A)(1) of the consent decree, he found that the activities alleged in the contempt petitions and particularized in supplementary papers did not violate the Section. Three weeks later, on June 12, 1972, the District Court dismissed the contempt petitions in accordance "with this Court's Memorandum Opinion dated May 18, 1972, in Civil Action No. SA-69-C4-114 [the original antitrust suit]."

It is evident the construction order was a ruling integral with the contempt proceedings, and not a final judgment within the meaning of the Expediting Act. *See* United States v. Indrelunas, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed.2d 202 (1973). To hold otherwise would allow the captioning of the application and construction order to override the substance of the ruling. United States v. Jorn, 400 U.S. 470, 478 n.7, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); United States v. Sisson, 399 U.S. 267, 279 n. 7, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970); United States v. Hark, 320 U.S. 531, 536, 64 S.Ct. 359, 88 L.Ed. 290 (1944).

We hold that we have jurisdiction to review the construction order in connection with any review jurisdiction we have of the contempt proceedings.

*Double Jeopardy*

Although admitting that we have jurisdiction to review criminal contempt proceedings, Martin contends that the dismissal of the criminal contempt petition in this case was tantamount to an acquittal and that the double jeopardy clause of the Constitu-

tion would prevent a trial in the event we reversed the District Court. If such were the case, a review would be inappropriate. *See* United States v. Sisson, 399 U.S. 267, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970).

Martin bases its claim on the extensive pre-trial discovery which it reasons confronted the Court with the merits of the Government's claims. Jeopardy is not always an easy concept to determine. "[A] defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of facts, whether the trier be a jury or a judge." United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971). In the case of a jury trial, a defendant is deemed to have been put in jeopardy when the jury is empanelled and sworn. Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). In a non-jury trial, jeopardy attaches when the court begins hearing evidence. Hunter v. Wade, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949).

The mere arraignment and pleading to an indictment or the conduct of a preliminary examination does not place the defendant in jeopardy. Collins v. Loisel, 262 U.S. 426, 429, 43 S.Ct. 618, 67 L.Ed. 1062 (1923); Bassing v. Cady, 208 U.S. 386, 391-392, 28 S.Ct. 392, 52 L.Ed. 540 (1908). Nor does the dismissal on a *nolle prosequi* when the witnesses have been sworn but before any have testified. Newman v. United States, 133 U.S.App.D.C. 271, 410 F.2d 259 (1969).



The Supreme Court has admonished us, however, to avoid any rigid rule and evaluate each case according to its facts. Illinois v. Somerville, *supra*. Indeed, this Court has noted the absence of fixed rules by which to measure an individual case. McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973).

In the case at bar the trial was admittedly in the pre-trial stages. It is true that the Government disclosed the nature of its case in the extensive pre-trial procedures ordered by the District Judge, but this did not commence a "hearing" of the evidence. The trial had not yet begun. Martin was never in jeopardy because it is "when the trial commences . . . that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated . . . ." United States v. Jorn, *supra*, 400 U.S., at 480, 91 S.Ct., at 555.

We find the authority relied upon by Martin to be inapplicable. United States v. Findley, 439 F.2d 970 (1st Cir. 1971), United States v. Ponto, 454 F.2d 657 (7th Cir. 1971), United States v. Grochowski, 454 F.2d 655 (7th Cir. 1971), and United States v. Gustavson, 454 F.2d 677 (7th Cir. 1971), are "draft act" cases[6] which precluded appeal by the Government. They did not turn on the double jeopardy clause. All of the cases were decided under the Criminal Appeals Act, 18 U.S.C.A. § 3731, prior to its amendment by the Omnibus Crime Control Act of

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[6] Prosecution for refusal to submit to induction under the Military Selective Service Act of 1967, 50 U.S.C.A. App. § 462(a).

1970, § 14(a), 84 Stat. 1890. Under the prior Act, appeal was limited, not only by the double jeopardy clause, but also by statutory constraints. In deciding *Findley*, *Ponto*, *Grochowski*, and *Gustavson*, the Courts relied on these statutory constraints rather than the double jeopardy clause.

The First Circuit stated in *Findley* that the defendant had "[a]dmittedly . . . not formally been put in jeopardy. . . . Collectively we believe this was an approach not in terms of double jeopardy, but in terms of the kind of error section 3731 was intended to cover." 439 F.2d at 973.

The Seventh Circuit in *Ponto*, sitting *en banc*, discussed the applicability of the double jeopardy clause: only three members of the five-judge majority were persuaded that the Constitution barred an appeal. 454 F.2d at 663. The two members of the majority who had concurred in the result on statutory grounds did not join in the opinion on the constitutional grounds. 454 F.2d at 665. The four dissenting judges disagreed on both statutory and constitutional grounds: they felt that the constitutional guarantee against double jeopardy was inapplicable since the trial had not begun and jeopardy had not attached. 454 F.2d at 667-668. A similar distribution in the voting occurred in the companion case, *Gustavson*. There, only seven members heard the case *en banc*. Only five expressed an opinion on the double jeopardy issue. Of these, two voted that it barred the appeal and three voted that the clause was inapplicable.



Since the draft act cases were not decided on jeopardy grounds, they do not support Martin's argument that jeopardy has attached in this case.

*Civil Contempt Jurisdiction*

The civil contempt petition is virtually identical to the criminal contempt petition. Since the dismissal of the criminal contempt petition is appealable to this Court, the civil contempt petition may also be heard here on the basis of judicial economy.[7] Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 612-618, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966), is illustrative of the judicial economy reasoning. In that case, the Federal Maritime Commission entered a reparation order directing a carrier to pay damages to a shipper. Both the carrier and the shipper appealed, each intervening in the appeal of the other. The Court of Appeals had jurisdiction to review the shipper's claim for an increase in damages, but did not have jurisdiction over the carrier's appeal which properly lay in the District Court through an enforcement proceeding by the shipper. The Supreme Court held that the Court of Appeals could properly review both appeals.

> With the jurisdiction of the Court of Appeals properly invoked by the shipper, there is, there-

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[7] The rationale of judicial economy to prevent duplicity in the federal system has precedent in the policy underlying cross-claims, pendant and ancillary jurisdiction. Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926); Smith Petroleum Service, Inc. v. Monsanto Chemical Co., 420 F.2d 1103, 1113-1115 (5th Cir. 1970); 2A Moore, Federal Practice, ¶ 8.07[5] (2d ed. 1972).

fore, every reason to permit the carrier not only to litigate the amount of the reparation order but also to insist upon a determination of the validity of the Commission's order, both with respect to the carrier's violation of the Act and with respect to the reparation award itself . . . . The minimal disadvantages resulting to the shipper from permitting the carrier to attack the reparation order are more than offset by the desirability of a prompt and efficient determination of the validity of the Commission's order . . . . And, once the carrier intervenes in the shipper's appeal, all the parties interested in the complete resolution of the validity of the Commission's order are before the court. In this situation it would make little sense to require the carrier to break off his argument short of its logical conclusion and relitigate it anew before a district court in an enforcement action.

383 U.S. at 616-617, 86 S.Ct. at 1024-1025.

Consideration of the appeals jointly in the case at bar is supported by the holding in two kinds of cases. First, in cases arising under the former Criminal Appeals Act, the Supreme Court required the Court of Appeals to review both grounds if the District Court's ruling was on alternative grounds, one appealable under the statute to the Supreme Court and the other to the Court of Appeals. United States v. Swift & Co., 318 U.S. 442, 444-445, 63 S.Ct. 684, 87 L.Ed. 889 (1943). Second, in cases involving a single order for civil and criminal contempt in which the Supreme Court has held that the criminal aspect of the order



controls for purposes of determining the procedure on appeal. *See* Union Tool Co. v. Wilson, 259 U.S. 107, 110, 42 S.Ct. 427, 66 L.Ed. 848 (1922) (cross writ); In re Merchants' Stock & Grain Co., 223 U.S. 639, 32 S.Ct. 339, 56 L.Ed. 584 (1912) (contempt decree containing both remedial and punitive provisions).

Without deciding whether we would have jurisdiction to review the civil contempt proceeding were it standing alone or were it substantially different than the criminal petition, we hold that we have jurisdiction to review the dismissal under the facts of this case.

*Contempt Charge*

At this juncture it is necessary to review the language of Section V(A)(1) of the consent decree:

V.

Each corporate defendant is enjoined and restrained from directly or indirectly:

(A) Threatening, coercing, inducing or attempting to induce:

(1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer . . . .

A consent decree is the manifestation of a negotiated settlement where the defendants in the original suit relinquished their right to litigate the issues of antitrust liability, relying fully on the decree terms. *See* United States v. Armour, 402 U.S. 673, 681-683,

91 S.Ct. 1752, 29 L.Ed.2d 256 (1971). It is necessary to look to the consent decree in its entirety to ascertain the meaning of the various sections as intended by the parties. United States v. Atlantic Rfg. Co., 360 U.S. 19, 22, 79 S.Ct. 944, 3 L.Ed.2d 1054 (1959). In so doing the trial court and this Court must give weight to the plain meaning of the words used. United States v. Armour, *supra* 402 U.S. at 682, 91 S.Ct. 1752. This caveat works to the protection of both parties.

Relying on the plain meaning of the words, the thrust of Section V(A)(1) is to prohibit Martin from engaging in activity which is aimed at causing any linen supplier to refrain from furnishing linen supplies to any customer. "Causing any linen supplier to refrain" is the key phrase of the section. The method used to procure the forebearance from competition is secondary: threats, coercion, and inducements by Martin are prohibited by V(A)(1) if they are aimed at a competitor with the intent to have that competitor refrain from competing with Martin.

The Government alleged that the following activities were violative of Section V(A)(1):

> threats of recoupment, threats of price wars and threats of retaliatory sales campaigns to induce competitors to enter into reciprocal agreements not to compete for customers, and to refrain from soliciting and taking customers from Martin . . . .

The District Court, after addressing itself to these allegations, held that "soliciting," "competing," and



"taking" were not synonymous with "furnishing linen supplies." "Furnishing linen supplies" was limited to delivering linen supplies. By so defining the phrase, none of the activity alleged by the Government was within the prohibition of Section V(A)(1) since the allegations were not addressed to furnishing linen supplies.

In examining the entire consent decree, however, the word "furnishing" appears in several different sections.[8] This repeated use of the words "furnish" or

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[8] Section II(c):

> "Linen rental supply business" means the business of *furnishing* clean linen supplies;

Section IV:

> Each defendant is enjoined and restrained from entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person, not owned or controlled by such defendant, to directly or indirectly:
>
> (A) Fix, determine, maintain, stabilize or adhere to prices, discounts, or terms or conditions of sale, for the *furnishing* of any linen supplies to any third person;
>
> (B) Divide, allocate or apportion markets, territories or customers for the furnishing of any linen supplies or otherwise restrict competition between or among linen rental suppliers;
>
> (C) Cause any seller of linen supplies to boycott or refuse to sell linen supplies to any linen rental supplier;
>
> . . . .

Section V(G):

> Discussing or exchanging with any linen rental supplier, prices or price lists for the *furnishing* of linen supplies to any customer, or exchanging with, *furnishing* to or receiving from any linen rental supplier or linen

"furnishing" in conjunction with the "linen supplies" indicates that the words are used collectively in this decree to describe the business in which the respondents are engaged. The words "furnish linen supplies" are used in the same manner in Section V(A)(1) and accordingly that section should be interpreted to mean that the defendants are prohibited from using threats, coercion and inducements to persuade their competitors to refrain from "doing business" with any customer.

Next, the District Court looked at the methods alleged by the Government to have been used by Martin. Finding that they centered on recoupment and retaliation, the Court stated that Martin may recoup business lost to competitors "by any means, including below cost prices, lump sum cash payments, loans, free services, gratuities and other inducements . . ." It was a simple step for the Court to conclude that Martin "may also say, in advance, that they will

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rental suppliers, any list of customers or customer accounts served by any linen rental supplier; . . . .

Section VI:

Each corporate defendant is enjoined and restrained from *furnishing* or offering or threatening to *furnish* linen supplies to a customer or potential customer on terms or conditions which involve below cost prices, lump sum cash payments to the customer, loans (other than bona fide loans by a defendant to its then existing customers), free service, gratuities or other similar inducements to obtain a contract or renewal of a contract for the *furnishing* of linen supplies, for the purpose or with the effect of eliminating a competitor or competitors.



engage in these same activities. The speculative effect of verbalization cannot be different than that of the deeds verbalized." As a consequence of this reasoning, the District Court found:

> 1. The provisions of Section V(A)(1) do not prohibit Martin and Cascade from recouping business lost to competitors, from engaging in price wars and retaliatory sales campaigns to effect such recoupment, and from threatening to engage in those activities.

The activities of recoupment and retaliation are not *per se* violations of Section V(A)(1). They are violations, however, if their announced purpose is to cause Martin's competitors to refrain from competing, since the Section prohibits activities which "directly or indirectly" attempt "to induce" competitors "*to refrain*" from doing business.

It may be acceptable, as the District Court found, for Martin to engage in activity to recoup business. There is a difference, however, in activities of recoupment aimed at the customers and the threats of recoupment aimed at the competitors. We are mindful of the fact that recoupment practices may have the side effect of discouraging competition. Such flows from the normal course of business. But the use of threats directed at competitors to restrain competition, or to obtain reciprocal noncompetitive agreements, as the Government alleges, goes to the heart of the antitrust problem. Such activity was recognized and prohibited by Section V(A)(1).

The District Court concluded that the alleged activities by Martin against competitors were unsuccessful. The Court accepted tables submitted by Martin "showing that for more than three years there has been a constant interchange of accounts between Martin . . . and some one hundred competitors in the State of Texas." This information is not dispositive of the issue: it is irrelevant under Section V(A)(1) whether or not Martin's competitors were actually induced to refrain from competing. The issue is whether Martin either directly or indirectly threatened, coerced, induced, or attempted to induce such action.

Assuming that the allegations by the Government in the contempt petitions and supplementary papers are factually true, Martin attempted to engage other linen suppliers in noncompetitive agreements and attempted to curtail competition under threats, corecion and inducements of retaliatory sales campaigns. Such alleged activity aimed at restraining competition is a *prima facie* violation of Section V(A)(1).

We have only assumed, as did the District Court, that the allegations are true. The District Court must now address the factual issues in the case. We remand for such purpose.

Reversed and remanded.



**APPENDIX D**

U. S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-69-CA-114

UNITED STATES

*v.*

MARTIN LINEN SUPPLY CO., TEX-MART CORP.,
TEXAS SANITARY TOWEL SUPPLY CORP.,
and WILLIAM B. TROY

Filed May 18, 1972

Memorandum Opinion and Order

Three Defendants have applied for construction of a single section of the Final Judgment ("Judgment") entered in this civil antitrust action upon consent of the parties on June 2, 1969. They move under Section X thereof which provides:

"X.

> Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance

herewith and for the punishment of violations hereof."

The application is made at this time because of the pendency of criminal and civil contempt proceedings charging that the applying Defendants, Martin Linen Supply Company ("Martin"), Texas Sanitary Towel Supply Corp. ("Cascade") and William B. Troy, President of Martin and Cascade, have wilfully, deliberately and contumaciously violated certain of the provisions of the Judgment.

The principal charge in the Criminal and Civil Contempt Petitions is stated in Paragraph 10 of each Petition. That Paragraph asserts that applying Defendants "have knowingly and wilfully violated Section V(A)(1) of the Judgment by threatening, coercing, inducing and attempting to induce competitors to refrain from soliciting business from linen supply customers of Martin and Cascade, by conducting retaliatory sales campaigns and threatening such campaigns as hereinafter described." Paragraphs 11, 12 and 13 of the Petitions allege specific conduct embraced within the foregoing general charge. This specification of conduct has been expanded and stated in more detail by Plaintiff during the course of pretrial proceedings in "Answers of United States of America to Interrogatories and Request for Production of Documents by Respondents," "Bill of Particulars" and "Supplement to Voluntary Bill of Particulars" ("Supplementary Papers").



The nature of the conduct the petitions describe as violative of Section V(A)(1) is summarized in Paragraph 11 of each Petition which reads as follows:

> "11. In furtherance of their efforts to threaten, coerce, and induce competitors to refrain from soliciting business from linen rental users who are customers of Martin and Cascade, the respondents have, among other things:
>
> "(a) Discussed with and communicated to competitors, directly and indirectly, the fact that respondents would recoup all business that the competitor took from respondents;
>
> "(b) Prepared and coordinated statistical records of all business lost to and won from each of their competitors ("Competitive Standing Book") to determine those competitors against whom retaliatory sales campaigns should be started; and
>
> "(c) Conducted the retaliatory sales campaigns described in Paragraphs 12 and 13 hereof."

On this application Defendants assert that Judgment Section V(A)(1) does not prohibit this kind of activity and ask the Court to so rule. They urge that if they are correct in this respect, construction of the Judgment at this time will substantially limit the factual issues to be litigated in the forthcoming contempt trials. In exercise of the judicial power retained in Section X of the Judgment the Court has entertained this application and enters its decision in

the above entitled civil action, not in the pending contempt proceedings.

The arguments of both sides on this application have been exhaustively briefed by the parties and vigorously argued orally. The Court has carefully considered all those briefs and oral arguments.

The parties agree that for the purpose of construing the scope and application of Section V(A)(1) the Court must assume that the allegations in the Contempt Petitions and Supplementary Papers charging violation of that Section are factually true. The Court has made that assumption.

Section V(A)(1) reads:

"V.

"Each corporate defendant is enjoined and restrained from directly or indirectly:

"(A) Threatening, coercing, inducing or attempting to induce:

"(1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer, . . . ."

Plaintiff's initial contention in opposing the construction sought by defendants was that this language clearly restrains Martin and Cascade from using, as well as threatening to use, lower prices, discriminatory prices, free services and other inducements to solicit and take customers from competitors who take customers from Martin and Cascade. Plaintiff retreated from this position to the extent of conceding that without violating the injunction of Section V



(A)(1) Martin and Cascade unilaterally may recoup business lost to competitors and that for this purpose they may engage in price wars and retaliatory sales campaigns. That concession is in accordance with accepted law. See *United States* v. *Borden Co.* [1953 TRADE CASES ¶ 67,754], 111 F. Supp. 562 (N.D. Ill. 1953) affirmed in relevant part [1954 TRADE CASES ¶ 67,754], 347 U.S. 514 (1954). This Court construes such recoupment, price wars and sales campaigns to embrace the use of lower prices, discriminatory prices, free service and other inducements not prohibited by other provisions of the Judgment or by the antitrust laws. After thus cutting down the activities claimed to be violative of Section V(A)(1) to threats of recoupment, threats of price wars and threats of retaliatory sales campaigns, Plaintiff added still one more concept to its view of the scope of Section V (A)(1). The final position taken by Plaintiff on this application is that Martin and Cascade by seeking to exact from their competitors reciprocal agreements not to compete for customers, backed up by warnings of economic reprisals, violate the letter and purpose of Section V(A)(1) of the Judgment.

The principles of construction the Court must follow here are time honored and clear. They have been restated by the Supreme Court most recently in *United States* v. *Armour Co.*, 402 U.S. 673 (1971).

At the outset we must remember that the Court has before it for construction a provision of a final judgment formulated in the course of negotiations

between the parties and entered on their consent. In those negotiations Defendants have bargained away their Constitutional right to litigate the issues of antitrust liability relying fully on the Judgment terms to which they have agreed.[1] The Second Circuit has noted: "It is important to the obtaining of consent decrees, on which the effective enforcement of the antitrust laws depend in no small degree, that the defendants who sign them should know that these will not be stretched beyond their terms." [2]

If the language of Section V(A)(1), standing alone, is clear and unambiguous the reach of that Section must be determined solely from the words in which its provisions are couched.[3] Those words specifically enjoin defendants from threatening, coercing, inducing or attempting to induce a competitor to refrain, while in business, *from furnishing linen supplies to any customer*. Plaintiff urges the Court to find that the emphasized phrase prohibits Martin and Cascade from utilizing unilateral threats of recoupment, threats of price wars and threats of retaliatory sales campaigns to induce competitors to enter into reciprocal agreements not to compete for customers, and to refrain from soliciting and taking customers from Martin and Cascade. The Court can so find only

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[1] *Armour, supra,* at p. 682.

[2] *United States* v. *American Society of Composers, Authors & Publishers,* 331 F. 2d 117, 123-124 (2nd Cir. 1964) cert. den., 377 U.S. 977 (1964).

[3] *Armour, supra,* at p. 682.



if in ordinary usage and common understanding "competing," "soliciting" and "taking" are synonymous with "furnishing." They are not so synonymous.

In relation to customers, the word "furnish" is the equivalent of "serve". It means to provide, supply or give service to. There is nothing in any dictionary or other definition of "furnishing" to suggest that "furnishing linen supplies" is a broader term embracing the additional unrelated concepts of soliciting linen supply customers, competing for linen supply customers or taking linen supply customers. "Solicit," with respect to any customers, means canvass, court, woo, seek and bid for. With respect to customers "compete" means to vie for or enter into competition with a business rival for. "Take," with respect to customers, is a synonym for acquire, get, obtain, secure and procure. All of the activities signified by these latter terms are distinct from and far beyond the scope of the limited conduct described by the word "furnishing". Had the parties intended by the provisions of Section V(A)(1) to formulate an injunction against inducing or threatening to induce competitors to refrain from soliciting the customers of Martin and Cascade; or to refrain from competing with Martin and Cascade for the business of their customers; or to refrain from taking customers away from Martin and Cascade, there are words other than "furnishing" which they could have used to express any such intention clearly and unmistakably. The parties used none of those words. The Court may not stretch "furnishing" beyond its ordinary and gen-

erally understood meaning to embrace the different and distinct conduct Plaintiff would like to read into that term. "If the parties had agreed to such a prohibition they could have chosen language that would have established the sort of prohibition the Government now seeks." *

When Section V(A)(1) is read together with Section VI it is apparent that the former does not prohibit unilateral threats by Martin and Cascade to recoup by any means, including below cost prices, lump sum cash payments, loans, free service, gratuities and other inducements, business these firms lose to competitors.

Defendants have presented in the Affidavit of Mervin C. Pollak, Esq. the evolution in negotiation of the provisions of Section V(A)(1). Plaintiff has argued against, but has not refuted, the facts alleged in that Affidavit. The Court is concerned with this evolution only to the extent that it shows Section V(A)(1) did have a specific and limited purpose and that this purpose was different from that now urged by Plaintiff.

There can be no distinction in fact between the information conveyed to competitors by a general unilaterally followed policy of recoupment and retaliation and a public or private communication of that policy. Since Plaintiff has conceded that Martin and Cascade may properly engage in these competitive activities originally claimed by Plaintiff to be

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* *Armour, supra* p. 681.



violations of Section V(A)(1) because of their theoretical, coercive and inhibiting effect on competitors, it is clear that Cascade and Martin may also say, in advance, that they will engage in these same activities. The speculative effect of verbalization cannot be different than that of the deeds verbalized.

Plaintiff has admitted in its briefs on this application that in fact the competitors of Martin and Cascade have not been dissuaded by any of the practices charged from continuing to compete with Martin and Cascade. Defendants have submitted undisputed figures showing that for more than three years there has been a constant interchange of accounts between Martin and Cascade and some one hundred competitors in the State of Texas. This is a strong picture of competition which belies the curtailment of competition Plaintiff fears theoretically could result from the recoupment and retaliatory threats charged against Martin and Cascade.

For these practical reasons the Court's inability to find in the provisions of Section V(A)(1) the prohibitions Plaintiff would like to find there does no violence to antitrust principles. It has long been basic that inquiry into antitrust legality is not mechanical or artificial. *Appalachian Coals, Inc.* v. *United States* [1932-1939 TRADE CASES ¶ 55,025], 288 U.S. 344, 360 (1933). All such inquiry is directed at the substance of challenged conduct, not its form. *United States* v. *Masonite Corp.* [1940-1943 TRADE CASES ¶ 56,209], 316 U.S. 265, 278 (1942).

If Defendants were to be hampered by the restrictions Plaintiff seeks to impose upon their competitive conduct under Section V(A)(1) they would soon be marked for extinction by predatory competitors, including those aggressive enough to lodge the complaints on which Plaintiff has acted in the contempt proceedings. Effective competition from Martin and Cascade would be eliminated and public users of linen rental service in Texas would suffer from that elimination. No antitrust judgment should be construed to have such an anticompetitive effect unless the clear and unavoidable mandate of its language leaves a Court with no other choice and no alternative construction. Section V(A)(1) has no such compelling mandate.

It is fundamental that the provisions of Section V(A)(1) represent "an agreement by the parties which the Court cannot expand or contract." [5] With Mr. Justice Marshall the Court here is compelled to say that even if the construction sought by Plaintiff *were* "in keeping with the purposes of the antitrust laws, we do not believe it is supported by the terms of the consent decree under which it is sought." [6] In *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959) the Supreme Court declined, under the guise of interpretation, to substantially change a decree "to which the parties consented without adjudication of

[5] See *Artvale, Inc.* v. *Rugby Fabrics Corp.*, 303 F.2d 283, 284 (2nd Cir., 1962).

[6] *Armour, supra,* at p. 683.



the issues" [7] merely because "another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place." [8]

Accordingly the Court finds:

1. The provisions of Section V(A)(1) do not prohibit Martin and Cascade from recouping business lost to competitors, from engaging in price wars and retaliatory sales campaigns to effect such recoupment, and from threatening to engage in those activities.

2. None of the activities of Defendants charged as violations of Section V(A)(1) in Paragraphs 10, 11, 12 and 13 of the Contempt Petitions and in the Supplementary Papers, violate the injunctions of that Section.

It Is So Ordered.

[7] *Atlantic, supra,* at p. 23.

[8] *Id.*, at p. 24.

**APPENDIX E**

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed Apr. 24, 1975]

SA 71 CR 419

UNITED STATES OF AMERICA

*v.*

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP. and WILLIAM B. TROY

JUDGMENT OF ACQUITTAL OF
MARTIN LINEN SUPPLY COMPANY

On the 18th day of February, 1975, trial of this matter was commenced before a Jury upon the plea of not guilty by Respondent, MARTIN LINEN SUPPLY COMPANY, to the offense of criminal contempt of this Court arising from an alleged violation of the Consent Decree ("Final Judgment") entered in the case of *United States of America* v. *Martin Linen Supply Company, et al.*, Civil Action No. SA-69-CA-114, on June 2, 1969.

Thereafter, MARTIN LINEN SUPPLY COMPANY timely filed its Motion for Judgment of Acquittal at the close of all the evidence in this cause and after considering all of the evidence adduced on



the trial hereof and all of said motions filed herein having been carefully considered by the Court, the Court finds that the grounds set forth in that Motion are good and valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that further this defendant should be found "not guilty".

It is accordingly ADJUDGED that Respondent, MARTIN LINEN SUPPLY COMPANY, is not guilty of the charges against it, and is hereby ACQUITED AND DISCHARGED as to all charges herein.

IT IS SO ORDERED that a certified copy of this Judgment be delivered by mail to counsel for Respondent, MARTIN LINEN SUPPLY COMPANY.

ENTERED this 22nd day of April, 1975.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
United States District Judge

## APPENDIX F

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed Apr. 24, 1975]

SA 71 CR 419

UNITED STATES OF AMERICA

*v.*

MARTIN LINEN SUPPLY COMPANY, TEXAS SANITARY TOWEL SUPPLY CORP. and WILLIAM B. TROY

JUDGMENT OF ACQUITTAL OF
TEXAS SANITARY TOWEL
SUPPLY CORPORATION

On the 18th day of February, 1975, trial of this matter was commenced before a Jury upon the plea of not guilty by Respondent, TEXAS SANITARY TOWEL SUPPLY CORP., to the offense of criminal contempt of this Court arising from an alleged violation of the Consent Decree ("Final Judgment") entered in the case of *United States of America* v. *Martin Linen Supply Company, et al.*, Civil Action No. SA-69-CA-114, on June 2, 1969.

Thereafter, TEXAS SANITARY TOWEL SUPPLY CORP. timely filed its Motion for Judgment of



Acquital at the close of all the evidence in this cause and, after considering all of the evidence adduced on the trial hereof and all of said motions filed herein having been carefully considered by the Court, the Court finds that the grounds set forth in that Motion are good and valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that further this defendant should be found "not guilty".

It is accordingly ADJUDGED that Respondent, TEXAS SANITARY TOWEL SUPPLY CORP., is not guilty of the charges against it, and is hereby ACQUITED AND DISCHARGED as to all charges herein.

IT IS SO ORDERED that a certified copy of this Judgment be delivered by mail to counsel for Respondent, TEXAS SANITARY TOWEL SUPPLY CORP.

ENTERED this 22nd day of April, 1975.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
United States District Judge

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA69CA114

UNITED STATES

*v.*

MARTIN LINEN SUPPLY CO., TEX-MART CORP.,
TEXAS SANITARY TOWEL SUPPLY CORP.,
and WILLIAM B. TROY

Entered June 2, 1969

### Final Judgment

SPEARS, D. J.: Plaintiff, United States of America, having filed its complaint herein, defendants having filed their answer thereto, and the plaintiff and the defendants having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party signatory hereto with respect to any such issue;

Now, Therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties as aforesaid, it is hereby

Ordered, Adjudged and Decreed, as follows:



### I

This Court has jurisdiction of the subject matter of this action and of each of the parties hereto, and the complaint states claims upon which relief may be granted against the defendants and each of them under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, as amended.

### II

As used in this Final Judgment:

(A) "Person" means any individual, corporation, partnership, association, firm or other legal entity;

(B) "Linen Supply" or "linen supplies" means towels, swipe towels, continuous roll towels, napkins, table cloths or covers, sheets, pillow cases, aprons, bibs, chefs' pants, caps, jackets, ladies uniforms, skirts, gowns, bartender vests, coats, waitresses' vests, and similar items;

(C) "Linen rental supply business" means the business of furnishing clean linen supplies;

(D) "Linen rental supplier" means a person who rents clean linen supplies to customers or users:

### III

The provisions of this Final Judgment applicable to any defendant shall apply to each such defendant, to its successors and assigns, to each of their respec-

tive officers, directors, agents, servants and employees, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

Each defendant is enjoined and restrained from entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program with any person, not owned or controlled by such defendant, to directly or indirectly:

(A) Fix, determine, maintain, stabilize or adhere to prices, discounts, or terms or conditions of sale, for the furnishing of any linen supplies to any third person;

(B) Divide, allocate or apportion markets, territories or customers for the furnishing of any linen supplies or otherwise restrict competition between or among linen rental suppliers;

(C) Cause any seller of linen supplies to boycott or refuse to sell linen supplies to any linen rental supplier.

V

Each corporate defendant is enjoined and restrained from, directly or indirectly:

(A) Threatening, coercing, inducing or attempting to induce:



(1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer, or

(2) Any officer, director, agent, servant or employee of any other linen rental supplier to divulge or make known to such defendant any customer lists or customer accounts known to such person by virtue of his employment by such other linen rental supplier.

(B) Threatening to put any linen rental supplier out of business;

(C) Enticing any employee of a linen rental supplier to take other employment with such defendant with the purpose and effect of hampering, injuring or prejudicing such linen rental supplier in its business;

(D) Knowingly making or causing to be made to any person any false report or false statement concerning the financial standing or business integrity of any linen rental supplier or that any linen rental supplier:

(1) is extending gifts or preferential prices to its customers, or

(2) Is about to cease business operations, or

(3) Is to be acquired by or merged with any linen rental supplier;

(E) Trailing or causing to be trailed the vehicle or vehicles, deliveryman or deliverymen of any other linen rental supplier;

(F) Temporarily augmenting or adding to its personnel in any trading area outside of the course

of a normal selling campaign for the purpose or with the effect of eliminating a competitor or competitors;

(G) Discussing or exchanging with any linen rental supplier, prices or price lists for the furnishing of linen supplies to any customer, or exchanging with, furnishing to or receiving from any linen rental supplier or linen rental suppliers, any list of customers or customer accounts served by any linen rental supplier; provided that subsections (A)(2) and (G) shall not prohibit:

(1) Any discussion or exchange of such information in connection with the bona fide negotiation of, or a contract for, the purchase or sale of a linen supply business, or

(2) Any industry representative from compiling such price information as may be necessary to the negotiation of a labor contract or to a governmental investigation or proceeding and using such information in general and composite form without identifying any of the prices gathered as those of any particular linen supplier, in connection with such negotiation, investigation or proceeding;

(H) Organizing or participating in any of the activities of, or of supporting, being a member of, or contributing anything of value to any group or association for linen rental suppliers, the purposes or activities of which are in any manner inconsistent with any of the provisions of this Final Judgment.



## VI

Each corporate defendant is enjoined and restrained from furnishing or offering or threatening to furnish linen supplies to a customer or potential customer on terms or conditions which involve below cost prices, lump sum cash payments to the customer, loans (other than bona fide loans by a defendant to its then existing customers), free service, gratuities or other similar inducements to obtain a contract or renewal of a contract for the furnishing of linen supplies, for the purpose or with the effect of eliminating a competitor or competitors.

## VII

Each of the corporate defendants and each of its shareholders, officers, directors and employees is enjoined for a period of three years from the date of the entry of this Final Judgment:

(A) From directly or indirectly making any form of capital contribution to, or increasing by investment or otherwise, the capital of defendant Martin Linen Supply Co.;

(B) From rendering, directly or indirectly, any form of financial assistance to or for the benefit of defendant Martin Linen Supply Co., including the making, guaranteeing or procuring, in any way, of loans, advances of money or extensions of credit on any basis, except the extension of short term trade credits customary and normal in the trade, and on non-discriminatory terms, in connection with the pur-

chase of linen supplies and related items from any defendant;

(C) From directly or indirectly making any form of capital contribution to, or increasing, by investment or otherwise, the capital of defendant Tex-Mart Corp., or rendering any form of financial assistance to or for the benefit of defendant Tex-Mart Corp. except the advancement or procurement of funds and/or financing which may be required to enable defendant Tex-Mart Corp. to purchase outstanding capital shares of defendant Martin Linen Supply Co., at any time owned by any shareholder or shareholders other than defendant Tex-Mart Corp.

VIII

(A) For a period of three years corporate defendants shall notify the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice at least thirty days prior to the date of a proposed acquisition of the stock, assets, or business of a linen rental supplier doing a volume of business in excess of four hundred dollars per week of the general terms of the proposed acquisition, including the name of the seller or sellers, and the volume of linen rental supply business done by the business to be acquired during the preceding twelve months;

(B) For the said three year period, on or before each April 1st, August 1st, November 1st and February 1st, each corporate defendant shall submit in writing to the said Assistant Attorney General the information specified in subdivision (A) of this section as to each acquisition by any corporate defendant of the stock, assets or business of a linen rental supplier, irrespective of the weekly volume thereof, consummated in the preceding three month period.



IX

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to any defendant, made to its principal office, be permitted subject to any legally recognized privilege (a) reasonable access during the office hours of such defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any matters contained in this Final Judgment, and (b) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters. A defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice made to its principal office, shall submit reports in writing with respect to any of the matters contained in this Final Judgment as may from time to time be necessary and requested for the enforcement of this Final Judgment. No information obtain-

ed by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to any person except a duly authorized representative of the Executive Branch of the United States and except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

## X

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or the carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the purpose of enabling the plaintiff to apply to this Court for the enforcement of compliance herewith and for the punishment of violations hereof.

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